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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-984

RAUL MASCARENHAS,

Petitioner,

VERSUS

MERIDIAN HOSPITAL AUTHORITY,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I.

REASONS FOR DENYING WRIT

The decision below does not conflict with any decision of the Supreme Court or any other court of appeal and correctly decides all state questions in accordance with applicable state law.

STATEMENT, ARGUMENT AND AUTHORITIES

Article 4437(E) V.A.T.S. creating the Hospital Authority was enacted by the Texas Legislature for the purpose of carrying into effect the Federal Statutes authorizing Federal funding of *public and other non-profit* community hospitals. The law is settled in Texas that a Contract that is contrary to the purpose, spirit and policy of a Federal or State Statute is against public policy and is void even though said Contract is not actually illegal per se. *Boone v. Pierce*, 218 SW2nd 347. The policy, spirit and purpose of the Federal Statutes authorizing the Federal funding of the Hospital Authority is declared in *U.S.C.A., Title 42, Sec. 291*, as follows:

> "Sec. 291. CONGRESSIONAL DECLARATION OF PURPOSE.
> The purpose of this subchapter is –
> (a) to assist the several States in carrying out of their programs for the construction and modernization of such *public or other non-profit* community hospitals and other medical facilities as may be necessary, in conjunction with existing facilities, to furnish adequate hospital, clinic, or similar services to all their people."

Article 4437E V.A.T.S. creating the Hospital Authority provides as follows:

> "Sec. 14. The hospital shall be operated *without the intervention of private profit* for the use and benefit of the public . . ."
>
> "Sec. 16. Recognizing the fact that the property owned by Authority *will be held for public purposes only* and *will be devoted exclusively to the use and benefit of the public*, it shall be exempt from taxation of every character."

The Contract in question simply provides that if Mascarenhas and Burgos move to Meridian, practice in said hospital and furnish twenty-four hour coverage for twelve months that they will have a twenty year option right to have said hospital and all of its facilities given to them subject to the debt against same. The use of said Federal and State Statutes and Federal funds for the acquisition of privately owned and operated hospitals for private gain is patently against public policy as declared by said Statutes. That such is void is clearly settled by the decisions of the Supreme Court of Texas as follows:

> "(1) . . . Such an agreement is contrary to the purpose, spirit and policy of the law under which the bonds of the Federal Farm Mortgage Corporation were exchanged for the prior vendor's lien notes, and was therefore void . . .
>
> The purpose and true spirit of the law under which bonds of the Federal Farm Mortgage Corporation are issued in lieu of pre-existing indebtedness is the same as under the law pertaining to bonds of the Home Owners Loan Corporation . . .
>
> We conclude therefore that the notes in question, insofar as they brought forward any part of the previous vendor's lien notes, are void, and the lien securing same is also void." *McCrory v. Smeltzer*, 124 SW2nd 339 (Supreme Court of Texas)

Furthermore, said Contract not only violates the spirit and policy declared by *Article 3, Sec. 52* of the Constitution of the State of Texas adopted November 3, 1970, but is directly and expressly forbidden by said provision of said Constitution which provides as follows:

"Sec. 52. COUNTIES, CITIES, TOWNS OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS; LENDING CREDIT; GRANTS

Sec. 52. (a) Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city or town or other political corporation *or subdivision of the State* to lend its credit or *to grant* public money or *thing of value* in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company."

Mascarenhas adduced undisputed evidence that the hospital facilities had a market value of two million dollars and that the only indebtedness against the same was six hundred thousand dollars, thus rendering the equity therein a *thing of value* as a matter of law. Granting to them an option to demand conveyance of title to them to said public facility any time they desire for twenty years in the future merely subject to their assuming the existing debt against same is manifestly violative of the spirit, policy and express words of said Constitutional provision. As stated in *Grimes v. Bosque County*, 240 SW2nd 511,

> "(3-6) . . . The expenditure of public funds is jealously guarded by our Constitution and the Commissioners Court has no authority to make any gratuitous grant of funds or to use the public credit for the benefit of an individual . . ."

That which is void is forever void, there can be no ratification thereof, estoppel based thereon, nor damages recovered for breach thereof. The law is well stated in *13 Tex. Jur. 2nd, Sec. 202* as follows:

> "As a general rule, an illegal contract is void and unenforceable, and will not support a remedy in a court of justice. Such a contract is 'void' and not merely 'voidable', since no express disaffirmance is required to avoid it. Furthermore, such a contract cannot be ratified. Consequently, it is declared that the parties to an illegal contract cannot recover from each other for anything done or promised in carrying out the agreement. In other words, an illegal contract cannot impose any legal obligations on the parties thereto or constitute the basis of any enforceable legal or equitable rights that might otherwise arise from a breach of the agreement."

Apart from the Contract being void for being against public policy and illegal, Plaintiff, as a matter of law, wholly failed to prove the occurrence of an expressly stated condition precedent to any validity of the Contract. The Contract itself expressly provided as follows:

> "(5) (a) It is understood that Authority in selling the bonds to HUD entered into an indenture mortgage and *any sale thereof shall be subject to the approval of HUD* and this option contract is conditioned that before any sale is consummated it shall meet the requirements of HUD with regard thereto or if said bonds have been sold or disposed of by HUD it shall meet the approval of the Trustee in said indenture."

Any sale under the Contract shall be subject to the approval of HUD. Not only did Plaintiff fail to prove this condition precedent to any cause of action but Defendant went further than necessary and proved conclusively that HUD had not approved thereof. As stated in *13 Tex. Jur. 2nd, Sec. 280,*

> "If a promise is made subject to the happening of a condition precedent, no liability or obligation can arise on the part of the promisor, and there can be no breach of the contract by him, until the condition occurs or is performed."

Moreover, the undisputed testimony including that of Mascarenhas and Burgos conclusively established a breach of the further condition precedent that one of the doctors or another qualified physician provided by them would maintain twenty-four hour coverage during the first year of the alleged Contract. The doctors admitted said breach and their only defense thereto was the contention that such was waived by the Board. The record showed that the Board acting as a body never at any time took any action that might be construed as a waiver of said breach. Plaintiff's contention that he told Jack Cureton and Brister at Cureton's office that if there was going to be anything raised about his breach later on then he wanted to void the Contract as of then and that said Cureton and Brister acquiesced at said time is of no relevance whatsoever since it is elemental law that a governing board of any subdivision of the State can only be bound or affected by act of said board acting as a body and not by actions of an individual member or members apart therefrom. *Swain v. Montgomery*, 154 SW2nd 695, *Wilson v. Calhoun County*, 489 SW2nd 939, *Eastex Wildlife Conservation Ass'n. v. Jasper County Dog and Wildlife Protective Ass'n.*, 450 SW2nd 904, *B County v. Roberts*, 437 SW2nd 62. To have waived said admitted breach by the absence of both of said doctors for four to five weeks without providing another qualified physician during said period the Board would have had to have acted as a body and done some clear, unequivocal and decisive act evidencing its intention to waive. *Corbin v. Slagel*, 300 SW2nd 657. Such was not shown or intimated in this case.

The record was also undisputed that the Contract signed by Brister in Cureton's office on July 12 was not the Contract authorized by the Board three days earlier on July 9 (App. 557) and therefore, the Contract executed by Brister was without the scope of his authority and is not binding upon the Board. Also, even if the Contract had been authorized by the Board, which it patently was not, its execution would be beyond the

authority of the Board since property held in a governmental capacity cannot be sold by a subdivision of the State without legislative authority. *Yorkley, Municipal Corporations, Vol. 2, Sec. 432B.* It should be noted that the Hospital Authority is not only without any authority to give or convey the hospital property, but did not even have the power to enter into a lease of hospital property until June 14, 1973, when the Legislature passed Article 4437E-1 specifically authorizing the authority under given conditions to lease hospital property.

In addition to the above, the Contract provides that, "if one of said doctors is proven guilty of gross misconduct or gross negligence then the Authority will have the right to withdraw the purchase option from said doctor" and the testimony of Nurse Montinez as to Mascarenhas scheduling and attempting to perform a hiatal hernia operation when he was warned before hand that he did not have the instruments to perform same (App. 467) and also when the undisputed evidence of even Burgos showed he was not qualified to perform such an operation (App. 238) and his announced decision not to remove the metal pin he had driven beyond the bone until three days thereafter because he had patients waiting in his office (App. 475) compels a finding of gross neglect. Such finding is further compelled by the express testimony of Dr. Hilderbrand, a Scott and White trained physician, that each of said acts by Mascarenhas was such a heedless disregard of the patient's interest and such an entire want of care as to raise a presumption of conscious indifference to the patient's welfare. It should be noted that the Court actually made no finding as to the issue of fact as to whether Mascarenhas had, in fact, been guilty of gross neglect, but merely stated that at the time the Board first could have had proof of such would have been at the hearing on September 14, 1973. We respectfully submit that the evidence is undisputed that the acts of Mascarenhas constituted gross neglect, but that if the same is not established as a matter of law then such was an issue of fact that the Trial Court has not

yet passed upon due to its conclusion that the Contract was against public policy and thus void.

CONCLUSION AND PRAYER

The Judgment of the Trial Court and Court of Appeals is correct and writ of certiorari should be denied and it is accordingly so prayed.

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the above Brief has been duly mailed to counsel for Petitioner on this 20th day of March, A.D. 1978.

W. V. Dunnam, Jr. - Attorney for
Respondent, Meridian Hospital Authority